# No. 20248

In the

# United States Court of Appeals

*For the Ninth Circuit*

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HOT OIL SERVICE, INC., a New Mexico corporation, doing business as Graves Oil Company,

*Appellant,*

vs.

WINIFRED BECENTI HALL, individually, and WINIFRED BECENTI HALL as Administratrix of the Estate of Joe Hall,

*Appellees.*

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## Appellant's Reply Brief

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### OPENING STATEMENT

Inasmuch as appellant has fully discussed, and referenced by appropriate citations, appellant's position in this appeal in Appellant's Opening Brief, appellant herein will concern itself only with those arguments which have been raised in Appellees' Brief, a copy of which was received by counsel for appellant on December 22, 1965.

### ARGUMENT

#### I. Federal Question: Rights of Indian Women Marrying White Men

Appellees allege that appellee could have acquired no rights under 25 U.S.C.A. § 182 as a result of her marriage

to a white man, i.e., Joe Hall, inasmuch as United States citizenship has been conferred on all Indians as a result of a Citizenship Act of 1924, and other related acts and statutes. (Appellee's Brief, p. 3.) Assuming this to be true, appellees are alleging in fact that all Indians, including reservation Indians, have each and every right guaranteed every citizen of the United States, making 25 U.S.C.A. § 182 a nullity inasmuch as an Indian woman can gain no rights by marriage to a white man that other Indians generally do not possess. Nothing, however, could be further from the truth, as the rights of Indians as citizens of the United States are limited in many respects. For example, reservation Indians may be tried in tribal courts without the guaranties of the Constitution of the United States, i.e., they need not be given the protection of the Fifth Amendment against self-incrimination, Due Process or be granted a jury trial even for criminal offenses involving the death penalty. *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915, 919 (C.A. 10th Cir. 1957); *Colliflower v. Garland*, 342 F.2d 369, 376-77 (C.A. 9th Cir. 1965); Cohen, *Handbook of Federal Indian Law*, 1942, pp. 124, 181. Their freedom of religion may be interfered with by tribal legislation. *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (C.A. 10th Cir. 1959). Moreover, the tribal courts have exclusive jurisdiction over criminal matters arising between Indians on the reservation to the extent that such matters may be tried in the tribal courts under such rules and procedures as the tribal courts may establish. *Martinez, supra* at 917; *Talton v. Mayes*, 163 U.S. 376, 41 L.Ed. 196 (1896). Further the rights of Indians to devise by testamentary disposition and to inherit property are limited and regulated by Federal law and regulation, the Secretary of the Interior and the Bureau of Indian Affairs.

25 U.S.C.A. §§ 371, 372, et seq.; 25 C.F.R. 15, 16 and 17. The rights of Indians to dispose by sale or lease of restricted lands owned by the tribe or individual tribe members are also limited by Federal statute and Federal regulation, despite the fact that the U. S. Constitution makes certain guaranties to individuals regarding the right to property. 25 U.S.C.A. § 635; 25 U.S.C.A. § 391, et seq.; 25 C.F.R. §§ 131.5 and 131.12.

Appellant's position is simply that while the various acts and statutes referred to by appellees do confer a degree of United States citizenship on all Indians, a greater degree of citizenship has been conferred under 25 U.S.C.A. § 182 on Indian women who marry white men, in that they are guaranteed, without limitation, *all* the rights, privileges, and immunities of any other married woman. As appellant argued in Appellant's Opening Brief at pages 14-16, one of such rights is the right of a woman to take the domicile of her husband as her own.

Appellant feels confident that while appellees make the general argument that full citizenship has been conferred on all Indians, appellees would not for a moment argue that as an incident of such United States citizenship all Indians have the right to sue, and have the reverse right to be sued, in the Federal courts. To the contrary, one of appellant's basic arguments in the court below was that, because appellee was a Navajo Indian, suit had to be brought in the Navajo tribal courts as there was not the proper diversity of citizenship (i.e., an Arizona resident and a New Mexico resident) to maintain a suit in the Federal courts. (Transcript of Record, pp. 36-37, 81-82.)

That 25 U.S.C.A. § 182 has remained in the law despite later enactments conferring citizenship on Indians bespeaks the fact that it guarantees Indian women marrying white men rights they otherwise lack.

## II. Federal Question: Lease of Navajo Tribe Lands

Appellees cite various cases concerning controversies growing out of land which was originally a grant or patented by the United States of America. Appellant concedes that the mere fact that the title to land may find its origin in the United States is not sufficient reason to place all subsequent controversies concerning such land within the Federal court system. Appellant concedes that the mere fact that appellant holds a lease which was acquired pursuant to a Federal statute is not reason in itself to give the court below jurisdiction over the case as there being a Federal question involved.

It is appellant's position, however, that in order to determine that appellant has a right to rents due, a right to possession of the land in question and a right to a permanent injunction restraining appellants from entering on the property and in any way interfering with appellant's possessionary right, it is necessary for the court to examine the leases herein involved and to determine their validity in light of the Federal statute which permits the leasing of Indian tribal lands, i.e., 25 U.S.C.A. § 635. In other words, in order to find for appellant, the lower court must first determine that the lease conveying the subject land from the Navajo tribe to appellee is a valid lease in light of the statute. (Trader's Lease, see Transcript of Record, p. 67.) Second, the court must determine that the sublease conveying said land from appellee to appellant is a valid lease in light of the statute. (Sublease, see Transcript of Record, pp. 67-70.) Third, the court must determine that the service station lease, which in essence leased the subject land back to appellee and her then husband, is a valid, but expired, lease in light of the statute. (Service Station Lease, see Transcript of Record, pp. 71-77.) In effect, the court below must determine the rights of the parties under their respec-

tive leases in relation to the validity, construction and effect of the statute providing for the leasing of Indian lands. In order for appellant to be entitled to peaceful possession of the leased premises and to an injunction for same, appellant must have a bona fide leasehold under Federal statute which can only be determined by the court below in light of the Federal statute. *Littell v. Nakai,* 344 F.2d 486 (C.A. 9th Cir. 1965).

The only rights appellant possesses as a sub-lessee of Indian lands are rights created by and embodied in 25 U.S.C.A. § 635. In this regard, appellant pled in its Complaint and First-Amended Complaint in the court below the existence of a Federal question. (Transcript of Record, pp. 2 and 56.) Since appellees responded to these Complaints by the filing of Motion to Dismiss, it is not known to appellant what, if any rights, appellees as prime lessees or appellees as lessees of appellant might claim. Nonetheless, whatever rights they claim stem from 25 U.S.C.A. § 635.

In *Lancaster v. Kathleen Oil Co.,* 241 U.S. 551, 60 L.Ed. 1161 (1915), the court was faced with two leases executed by one Brown, a member of the Creek Tribe of Indians. The first lease held by the plaintiffs was valid except for the fact that it had never been approved by the Secretary of Interior. To the contrary, the second lease held by the defendant had been submitted to the Secretary of Interior as required, and approved. The Supreme Court in reversing the decree of the court below which dismissed the suit on the ground that the bill alleged no cause of action within the jurisdiction of the court as a Federal court, held at page 1165 as follows:

> "We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any

> rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval."

In *Skelly Oil Co. v. Phillips Petroleum Co.,* 174 F.2d 89, 97 (C.A. 10th Cir. 1949), the Court, in deciding whether a claim made under the Natural Gas Act (15 U.S.C.A. §§ 717-717w) was a Federal question, held:

> "It is not a claim arising out of, or dependent upon, state law. Rather, it is a claim arising out of, and dependent upon, the construction and application of Federal law, to wit, the Act and valid rules and regulations of the Commission promulgated thereunder. The regulations and rules promulgated by a Commission pursuant to its statutory authority have the force and effect of Federal law."

In *Grand River Dam Authority v. Going,* 29 F.Supp. 316, 320 (D.C., N.D. Okla. 1939), the court held:

> "Petitioner's license to construct the Grand River Dam having been granted by an agency of the Federal government makes this action one arising under the Constitution and laws of the United States, Lancaster v. Kathleen Oil Company, 241 U.S. 551, 36 S.Ct. 711, 60 L.Ed. 1161; * * *"

In the instant appeal, while the Federal agency did not per se grant the various leases, they could only be granted pursuant to Federal law and implementing agency regulations.

*Mashunkashey v. Clinton,* 11 F. Supp. 456 (D.C., N.D. Okl. 1935), involved an Act of Congress relating to funds

and property received by a guardian of a member of the Osage Tribe of Indians. In holding there was a Federal question, the Court, at p. 457, stated:

> "I am of the opinion that a federal question is presented. A case presents a federal question when it becomes necessary to construe the Constitution, laws, or treaties of the United States in order to decide the issue presented, or to decide as to the extent of some right, title, privilege, claim, or immunity asserted under the Federal Constitution and laws. In other words, when a plaintiff relies upon the laws of the United States, or where a recovery depends upon the construction of a law of the United States, a federal question is presented. See Lancaster v. Kathleen Oil Company, 241 U.S. 551, 555, 36 S.Ct. 711, 60 L.Ed. 1161, 1165; Wilson Cypress Company v. Del Pozo Y Marcos, 236 U.S. 635, 35 S.Ct. 446, 59 L.Ed. 758; Starin v. New York, 115 U.S. 248, 257, 6 S.Ct. 28, 29 L.Ed. 388; Ames v. Kansas, 111 U.S. 449, 462, 4 S.Ct. 437, 28 L.Ed. 482, 487; Cooke v. Avery, 147 U.S. 375, 385, 13 S.Ct. 340, 37 L.Ed. 209, 212; Bock v. Perkins, 139 U.S. 628, 650, 11 S.Ct. 677, 35 L.Ed. 314, 315."

Perhaps the clearest statement of the law herein applicable is found in *Jackson v. Gates Oil Co.,* 297 Fed. 549 (C.A. 8th Cir. 1924). There the action was brought to cancel an oil and gas lease, executed under the Act of Congress of May 27, 1908, by the guardian of a minor, who was a full-blood Choctaw Indian. The court held, at p. 551, as follows:

> "The proposition that the case stated in the complaint could not be prosecuted to judgment nor defended without construing and giving effect to the Act of May 27, 1908, seems too plain for argument. The rights which the complaint asserts the appellee claims and is exercising could be acquired only under Federal law, and the averments raise the inquiry whether that

law was complied with in acquiring those rights. In Osborne v. Bank, 9 Wheat. 738, 824 (6 L.Ed. 204) it is said:

'The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled in every case, to show its validity. The case arises emphatically under the law; the Act of Congress is its foundation. *The contract could never have been made, but under the authority of that Act. The Act itself is the first ingredient in the case—is its origin—is that from which every other part arises.*'" (Emphasis supplied.)

## III. Diversity of Citizenship

*Woods v. Interstate Realty Co.*, 337 U.S. 535, 93 L.Ed. 1524(1949), cited in Appellees' Brief at pages 9 and 10, does not stand as authority for the proposition that the lower court in the instant appeal lacks original jurisdiction based upon diversity of citizenship. In the *Woods* case respondent, a Tennessee corporation doing business in Mississippi without qualifying under a Mississippi statute, brought suit in the District Court for Mississippi to recover a broker's commission alleged due from petitioner, a resident of Mississippi. Appellees quote on page 10 of their Brief from that case by beginning in the middle of a sentence for reasons which become only too clear upon a reading of the proper quotation. The court in *Woods*, *supra* at p. 1527, held as follows:

"The York Case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create dis-

> criminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate."

How does the *full* reasoning of Mr. Justice Douglas fit into the instant appeal? It is simply this: In the *Woods* case local (Mississippi) law created a right, but did not supply a remedy in that respondent had failed to qualify as a foreign corporation doing business in the state. In the instant appeal any rights created were created by Federal law, i.e., 25 U.S.C.A. § 635, and not by local (Arizona) law. Without the Federal statute the Indian lands could not have been leased. The *Woods* case, if anything, fortifys appellant's allegation of original jurisdiction based on diversity of citizenship.

*Angel v. Bullington,* 330 U.S. 183, 91 L.Ed. 832 (1947), cited in Appellees' Brief at page 9, again dealt with the application and enforcement of a state law in a Federal court, i.e., a statute of North Carolina precluding recovery of a deficiency judgment. Moreover, that case hinged more of the doctrine of res judicata in that an adverse decision had already been obtained in the North Carolina Supreme Court. *Supra* at 835.

*Williams v. Lee,* 358 U.S. 217, 3 L.Ed. 2d 251 (1959), cited in Appellees' Brief at pages 8 and 9, stands as authority for the proposition that in certain given situations the laws of Arizona have no application to Indian reservations or Indians, and the Arizona state courts have no jurisdiction inasmuch as there is no grant of authority under Federal law. *Supra* at 255. This stems from the notion, well entrenched in the case law, that Indian tribes are dependent sovereign nations, remaining apart from control by the

states. *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832). Even this time honored theory is giving way somewhat as indicated throughout the text of the *Williams* case. Nonetheless, appellant fails to see its application to a Federal suit concerning leases executed pursuant to Federal law.

Appellant simply urges that appellee, as an Indian married to a white man domiciled in Arizona, is domiciled in Arizona for purposes of diversity of citizenship.

## CONCLUSION

Appellees Brief notwithstanding, appellant renews its request that this Court should reverse the District Court's Amended Order and Judgment which (1) granted appellee's Motion to Dismiss Complaint and Motion to Dismiss First Complaint for want of jurisdiction, and (2) granted appellee's Motion to Dissolve Temporary Restraining Order, dismissing appellant's Complaint, dismissing appellant's First Amended Complaint, dismissing the entire action, and denying appellant's application for a preliminary injunction. This Court should find that the District Court in fact has jurisdiction under 28 U.S.C.A. § 1331(a) and/or under 28 U.S.C.A. § 1332, as urged by appellant.

Respectfully submitted,

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## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

EARL H. CARROLL

## CERTIFICATE OF SERVICE

This is to certify that service of this brief was had upon appellee in the following manner: three copies of said brief were served upon counsel for appellees Winifred Becenti Hall, individually and as Administratrix of the Estate of Joe Hall, by depositing said copies in the United States mails, postage prepaid, directed to John M. Favour, Favour and Quail, Post Office Box 1391, Prescott, Arizona, on the 11th day of January, 1966.

EARL H. CARROLL